Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GEN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

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Comcast Corporation ("Comcast") hereby responds to the Commission's Notice of Inquiry[1/] regarding high-speed access to the Internet over cable and other facilities. Comcast welcomes the opportunity to assist the Commission in reviewing the compelling legal and public policy reasons why cable Internet services should remain unregulated.

I. INTRODUCTION AND SUMMARY.

This is a proceeding of rare consequence. The inquiry holds the potential for sweeping impacts -- salutary or otherwise -- on investment, innovation, and the Internet. It presents an opportunity for the Commission to demonstrate its continuing confidence in competition and deregulation, which are the core principles adopted on an overwhelmingly bipartisan basis in the Telecommunications Act of 1996 ("1996 Act"), and to affirm its commitment to policies that are demonstrably beneficial to U.S. consumers and the U.S. economy.

But this inquiry also provides a forum for the advocates of regulatory overreaching. In particular, it is inevitable that some incumbent local exchange carriers ("ILECs") and Internet

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1/ FCC 00-355, Notice of Inquiry (rel. Sept. 28, 2000) (hereinafter "*NOI*").

service providers ("ISPs") will continue their efforts to impose new regulatory restrictions on cable operators providing Internet service.[2/] For reasons of law and policy, the Commission must steadfastly resist any such proposals. Moreover, the Commission must recognize the importance, not just of any final decisions that may be made, but also of the signals that are sent during the pendency of the proceeding. Throughout, care must be taken to promote continued competition and innovation -- and to avoid regulatory intrusion -- in this most vibrant marketplace.

Two years ago, the Commission was confronted with ILEC and ISP proposals that it adopt a regulatory approach to cable Internet service. After careful consideration, the Commission decided ***not*** to promulgate rules or regulations but instead to permit the marketplace to develop free of government intrusion.[3/] This was the right course then. It is the right course now.

Events subsequent to the adoption of the "hands-off" policy prove the wisdom of the Commission's decision. Upgrades of cable facilities have continued at a rapid pace, and the availability of advanced services has been extended to millions more consumers. Other media providing Internet access services (DSL, satellite, wireless, etc.) have also experienced increased investment and accelerating growth.

Meanwhile, it has become increasingly clear that the "logic" employed by proponents of forced access requirements for cable has broad and decidedly negative ramifications. The reasoning invoked to justify forced access extends well beyond cable Internet and would

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[2/] Although the Notice of Inquiry generally uses the term "cable modem service," Comcast uses the term "cable Internet service," which more accurately describes the particular service that is the focus of this inquiry. A variety of other beneficial services, including IP telephony, may make use of cable modems. These services are still in development and should be free to evolve without governmental restraint.

[3/] *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2448 (1999) ("*First 706 Report*"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3207 (1999).

necessarily compel imposition of similar regulation on Internet services delivered via wireless, satellite, and broadcast services, and even unlicensed Part 15 offerings.

The evidence is clear. The Commission's approach is working. There is absolutely no reason to change course now.

In these comments, Comcast does not intend to try to address each of the nearly 200 separate questions posed in the Notice of Inquiry. For present purposes, Comcast believes it can best assist the Commission by structuring its comments to develop the following points:

As discussed in Part II below, the benefits of the Commission's hands-off approach are being demonstrated by Comcast and other cable companies, as well as by other providers of Internet services. The marketplace is developing precisely as the Commission has hoped, with more investment, more competition, more ways of delivering competing services, more opportunities for consumers, declining prices, and numerous other public benefits.

Part III explains in detail why cable Internet service cannot properly be regulated as communications common carriage. The Commission has long classified enhanced services -- now more commonly referred to as information services -- as being outside of its Title II jurisdiction. This restraint has produced a broad array of innovative information services, and it is a major factor in the explosive growth of the Internet. The 1996 Act was intended to preserve the unregulated status of information services, including Internet access services; if anything, Congress intended to strengthen the Commission's resolve to avoid regulation of the Internet. Congress also expanded the definition of "cable service," with the explicit intention of spurring cable companies to provide unregulated information services, as they have done. Congress did ***not*** choose to require "parity" of regulatory obligations as between cable companies and ILECs; in fact, it preserved existing regulatory distinctions and created new ones as well.

Part IV details how attempts to impose Title II obligations on cable Internet, and especially to apply legal obligations that apply uniquely to ILECs, are unsupported in law or in policy. These proposals cannot be justified under section 251(c) or under *Computer II*. Moreover, they would enmesh the Commission in extraordinarily complex matters that would require years of rulemakings and a misallocation of government resources that should be deployed in true competition-enhancing efforts.

As explained in Part V, imposition of Title II obligations on cable Internet would necessarily require similar treatment of other Internet access services. The result would be the imposition of new common carrier obligations on Internet services delivered by broadcast, wireless, satellite, and Part 15 services.

For the reasons discussed in Part VI, Comcast firmly believes that cable Internet service will develop appropriately without government intrusion. Marketplace forces will properly determine the timing and manner of arrangements between cable operators and unaffiliated ISPs to deliver Internet services. Comcast and other cable companies are already beginning to explore the technical and commercial issues raised by "multiple ISP access." Comcast took an important step in this direction this week with its agreement to enter a trial with Juno Online Services, Inc.

Part VII identifies a constructive role that the Commission can play, by preventing unwarranted state and local regulation of cable Internet. Finally, Part VIII discusses the universal service issues that were cleverly, but not constructively, raised by the United States Telecom Association.

II. THE WISDOM OF THE COMMISSION'S HANDS-OFF APPROACH IS CONFIRMED BY EXTRAORDINARY DEVELOPMENTS IN BROADBAND COMPETITION.

A. Comcast Is Investing Aggressively To Provide Broadband Services and Faces Growing Competition in Every Market Endeavor.

Comcast is one of the nation's largest and fastest-growing cable operators, with a proven track record of upgrading the systems it acquires. The company is known for its strong commitment to deploying digital technologies and to providing innovative service options to its customers. As explained in greater detail in Appendix A, Comcast's performance over the past several years proves the wisdom of the procompetitive and deregulatory policies resulting from the 1996 Act.

Infrastructure Upgrades. Faced with intense competition in its core business from providers of Direct Broadcast Satellite ("DBS") services,[4/] Comcast is responding by investing heavily in rebuilding and upgrading its systems. Currently, 81% of Comcast's customers are served by systems operating with bandwidths of 550 MHz or greater (allowing for approximately 80 channels of conventional analog video programming), and 64% are served by systems operating at 750 MHz or greater (110 channels).[5/] Every month, Comcast upgrades cable facilities serving nearly 250,000 more homes, mostly in areas served by recently acquired cable properties. Comcast is committed to rebuilding its systems in order to provide

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[4/] DBS providers are signing up two of every three new subscribers to multichannel video programming services. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978, 1090 (2000) (MVPD subscribership increased by 4.3 million between June 1998 and June 1999; of those 4.3 million new MVPD subscribers, 2.8 million subscribed to DBS, while 1.3 million subscribed to cable). The Commission has also found that cable's share of the multichannel video programming marketplace has steadily declined over the past several years, from 90% in 1995 to 82% in 1999. *Id.* at 981, 1090. *See also Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 00-132, Comments of the National Cable Television Association at 9-10 (Sept. 8, 2000) (more than 80% of MVPD subscriber growth between June 1999 and June 2000 went to DBS).

[5/] Frequency requirements vary for different services. Digital video channels do not require the same 6 MHz per channel that is used for analog video. The limited bandwidth of the cable plant is increasingly shared with services other than video, including Internet access, program guides, and more. *See infra* section IV C.

its customers with a full range of communications services, including new broadband offerings.

Digital Services. Comcast's investment of nearly $3.2 billion in fiber optics and nationwide system rebuilds since 1996 has enabled it to deploy an array of new digital services.[6/] Comcast is a recognized industry leader in providing digital cable services, and has now exceeded one million customers for its digital video service.

During the past year, Comcast has increased its focus on an accelerated rollout of its high-speed cable Internet service through Comcast@Home.[7/] At this time last year, Comcast@Home served 100,000 customers, up from just 25,000 in 1998. By the end of September 2000, that number had grown to more than 300,000. With accelerating installation rates, Comcast expects to add 8,000 new customers per week in December,[8/] and, by year's end, to serve over 375,000 Comcast@Home customers. Comcast's high-speed cable Internet service is now available to more than 4.4 million households in over twenty markets.[9/]

[6/] This investment has been financed by investors and has been taken solely at Comcast's risk. Although Comcast anticipates a continued high level of consumer response to its new services, Comcast is not guaranteed any particular rate of return for its investments. Indeed, in today's highly competitive marketplace, Comcast neither expects nor receives any assurances whatever of financial success.

[7/] *See, e.g.*, Mike Farrell, *Comcast Portfolio Generates Net Gains*, MULTICHANNEL NEWS, Mar. 6, 2000, at 52 (Comcast executives said to "plan an all-out push to double cable-modem subscribers in 2000"). Comcast@Home delivers unlimited high-speed broadband Internet services directly to a customer's personal computer using a coaxial cable connection and cable modem. Comcast@Home also provides local content, e-mail, personal web space, chat rooms, and round-the-clock, toll-free, customer support.

[8/] *See* Comcast Cable Communications, Inc., *Comcast Reports Strong Third Quarter Results* (Nov. 6, 2000) (press release), http://www.comcast.com/press_room/press_releases/ Comcast3Q2000Earnings.html (viewed Nov. 6, 2000). Comcast also is an acknowledged leader in the provision of free high-speed cable Internet services to schools and libraries. Last month, Comcast announced the connection of its 1000th school with a free high-speed cable modem, as well as an initiative to train teachers in using technology. *See* Comcast Cable Communications, Inc., *Summit Hall Elementary Is 1000th School Wired With Free High-Speed Internet Access by Comcast* (Nov. 3, 2000) (press release). Comcast now provides free high-speed Internet services to approximately 100 public libraries.

Incidentally, the 1000th school to receive free cable Internet service was in Montgomery County, Maryland. That installation occurred less than 90 days after Comcast had acquired the system.

[9/] As discussed *infra* in Section VI, Comcast recently announced an agreement with Juno to conduct a multiple ISP trial, beginning first quarter 2001.

Comcast's deployment of broadband services also includes the provision of wired local exchange service and a continued leadership role in developing IP telephony. Although Comcast currently provides local telephone service primarily through telephony operations it has gained via system acquisitions, Comcast plans a comprehensive entry into more than half a dozen telephone markets within the next two years. Comcast is also a leader in the development of IP telephony, a capability now being added to the CableLab's specification for PacketCable®.

In addition to new lines of business such as high-speed cable Internet services and telephony, Comcast is in various stages of developing and deploying other new services for its customers such as video-on-demand, interactive program guides, advanced home shopping, and digital video recording features. Comcast Cable Communications President Steve Burke recently stated: "Our goal is to launch one or 2 major products every year for the next 5 to 10 years and turn our company into a new products company."[10/]

Competitive Circumstances. Comcast faces intense competition in every segment of its business. In markets for multichannel video programming, DirecTV and Echostar are major players. In high-speed Internet, numerous ISPs (especially AOL) are using Verizon's DSL service as the basis for services that compete directly with Comcast@Home. RCN is rapidly constructing competing wireline systems and has already announced plans that will enable it to provide cable and cable Internet services in approximately half of Comcast's territory.[11/] In addition, companies such as Knology and Digital Access provide, or soon will provide, competing broadband wireline services in other Comcast markets.

[10/] Alan Breznick, *Cable Operators Aim for Steady Flow of Digital Services*, COMMUNICATIONS DAILY, Sept. 22, 2000, at 3.

[11/] *See, e.g.*, RCN Corporation, *RCN Expands Presence in the Philadelphia Region* (Oct. 2, 2000) (press release), http://www.rcn.com/investor/press/10-00/10-02-00/index.html (viewed Nov. 27,2000) ("RCN is rapidly establishing its footprint in the greater Philadelphia region").

While it continues to lead the cable industry's broadband deployment, Comcast is not unique among cable operators either in the efforts it is making to upgrade and expand its platform or in the growing competition that it faces. In fact, other multiple systems operators are likewise upgrading their facilities, deploying new services, and facing increasing competition. As the Commission considers all the healthy developments that are taking place throughout the cable industry, one crucial fact should be borne in mind: ***the pace at which Comcast and other cable companies will be able to deploy new digital broadband services and the variety of services they will ultimately be able to offer to consumers will be directly affected by the certainty and clarity of the regulatory environment.***

The investments needed to develop digital broadband services are huge (by the standards of anyone other than a Bell company). If the Commission succumbs to the entreaties of those who wish to burden cable Internet service with Title II regulation or, worse, the requirements Congress imposed deliberately and exclusively on ILECs, the investment community will inevitably respond by redirecting its capital elsewhere.

B. Competitive High-Speed Internet Services Are Being Offered by an Ever-Growing Number of Companies Using an Expanding Array of Technologies.

The market for Internet access services is already intensely competitive, and still more competition is coming. Several distinct technologies are being used, and others are being readied, to meet burgeoning consumer demand for Internet access.

Cable Internet currently faces formidable competition from Internet service providers using Digital Subscriber Line ("DSL") services provided by ILECs and by competitive local exchange carriers ("CLECs") such as Rhythms, Northpoint, and Covad. The Commission's most recent report on the subject indicated that, while cable Internet services grew by a robust 59% in the six month period ending June 30, 2000, DSL customers during the same period

grew nearly three times faster, by 157%.[12/] Many analysts expect DSL-based access to continue to grow more rapidly than cable Internet and, despite cable's early lead, to become the predominant means of high-speed access within two to four years.[13/]

Other vehicles for high-speed Internet access are also emerging rapidly. It is a rare week that does not bring announcements of new services, new partnerships, and/or new plans. The following list is illustrative, not exhaustive:

> ***Direct Broadcast Satellites.*** Both of the leading DBS providers have introduced high-speed Internet access services. DirecTV offers its DirecPC service, including Turbo Webcast™, Turbo Newscast™, and Turbo Internet™ services, offering 400 kbps downloads for $39.99 per month.[14/] Echostar is offering the Internet access service of Starband Communications, bundled with 150 channels of video programming, for a combined price of $99.99.[15/]
>
> ***Other Satellite Services.*** Numerous other satellite services are being developed to deliver high-speed Internet services. These services, mostly using Ka-band because of its broad bandwidth, include the Hughes Spaceway system, Astrolink, CyberStar, and SkyBridge.[16/]

[12/] *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, Report of Common Carrier Bureau, Industry Analysis Division, Table 1 (October 2000) ("*High-Speed Subscribership Report*").

[13/] *See Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Second Report, ¶ 191 n.234 (rel. Aug. 21, 2000)("*Second 706 Report*"); David Lieberman, *Slow Going for High-Speed Lines,* USA TODAY (Nov. 14, 2000), http://www.usatoday.com/usatonline/20001114/2835166s.htm (viewed Nov. 15, 2000) (citing prediction by Cahners In-Stat Group that "DSL will pass cable as the high-speed system of choice" in 2002).

[14/] *See* DirecPC.com, *Family Surfer Unlimited from DirecPC!* (advertisement of DirecPC price packages), http://www.direcpc.com/consumer/cost/unlimited.html; DirecPC.com, *What is DirecPC?* (advertisement of DirecPC), http://www.direcpc.com/consumer/what/what.html (viewed Nov. 30, 2000).

[15/] *See* Echostar Communications Corporation, *StarBand Communications* (advertisement), http://www.dishnetwork.com/content/promotions/starband/index.shtml (viewed Nov, 30, 2000); *see also* Peter S. Goodman, *Dishing Up of a New Link to the Internet*, WASHINGTON POST, at A1 (Nov. 6, 2000).

[16/] *See Filling in the Gaps*, TELECOMMUNICATIONS REPORTS INTERNATIONAL, at 87-91 (Sept. 2000).

Terrestrial Wireless. Radio spectrum at a variety of frequencies can be used to deliver Internet access using fixed wireless technologies. This is one of the primary expected uses for licenses assigned to Multichannel Multipoint Distribution Service and Local Multipoint Distribution Service.[17/] Sprint and Earthlink are teaming to offer broadband Internet access via fixed wireless,[18/] and Worldcom also plans to use MMDS for fixed-wireless Internet service.[19/] PCS spectrum too is increasingly being used for mobile Internet access, and the 30 MHz of spectrum that will soon be auctioned in the 700 MHz band is expected to enable the provision of high-speed Internet access in competition with DSL and cable Internet service.[20/]

TV Broadcasting. The advent of digital television will enable broadcasters to offer high-speed Internet services, using some of the excess capacity in their 20 Mbps digital broadcast signals.[21/] Congress expressly authorized broadcasters to use their digital spectrum to deliver "ancillary and supplementary services,"[22/] and companies such as Geocast and iBlast are developing the technical capabilities and the commercial relationships to turn this opportunity into services for consumers.[23/] Even the analog NTSC signal is now being exploited; Dotcast claims to be able to deliver 4.5Mbps of

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[17/] *See Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, Declaratory Ruling and Order, 11 FCC Rcd 18839 (1996); *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Licensees to Engage in Fixed Two-Way Transmissions*, Report and Order, 13 FCC Rcd 19112 (1998), Order on Reconsideration, 14 FCC Rcd 12764 (1999).

[18/] *See* Joshua Kwan, *Wireless Net Access To Debut Sprint To Roll Out Service for Valley*, SAN JOSE MERCURY NEWS, Oct. 24, 2000, *available at* http://www0.mercurycenter.com/resources/search/center/search_newslibrary.html (Article ID: 0010260347) (viewed Oct. 27, 2000); *Oh the Hypocrisy: Sprint's Fixed Wireless Service Offers Only One ISP*, CableFAX Daily, Oct. 30, 2000, at 1.

[19/] *See* CyberAtlas, *Broadband Alternatives to Cable and DSL Entering Market* (Nov. 14, 2000), http://cyberatlas.internet.com/markets/broadband/print/0,,10099_511211,00.html (viewed Nov. 15, 2000) (Worldcom plans to offer fixed-wireless Internet service in 60 markets in 2001 and 100 by 2002). This article is noteworthy because it reports on a report by Parks Associates that predicts alternative broadband technologies (not cable and not DSL) will acquire a 17 percent share of the broadband market by 2004.

[20/] *See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, First Report and Order, 15 FCC Rcd 476, 478-9 (2000). The auction of licenses for the 747-762 and 777-792 MHz bands is currently scheduled to begin in March 2001. *See Auction for Licenses for the 747-762 and 777-792 Mhz Band Postponed Until March 6, 2001*, Public Notice, FCC 00-282 (rel. July 31, 2000).

[21/] *See, e.g., Broadcasters Told to Balance Datacasting, DTV Programming,* COMMUNICATIONS DAILY, Nov. 22, 2000, at 3 (President of one group of network affiliates says datacasting "could deliver an immense amount of materials to consumers at a great price; [t]his is a whole new business; [t]here will be a lot of applications coming forward").

[22/] 47 U.S.C. § 336(a)(2).

[23/] *See* Jim Davis, *TV Industry Getting Serious About 'datacasting'*, Cnet News (March 8, 2000), http://www.canada.cnet.com/news/0-1006-200-1567193.html?tag=st.cn.1.lthd.1002 (viewed Nov. 15, 2000). As of last week, 164 broadcasters had commenced DTV operations. *See* COMMUNICATIONS DAILY, Nov. 24, 2000, at 8.

data, without disruption of NTSC television, to offer access to websites, software, video games, music, TV clips, and movies.[24/]

Part 15. Low-power devices operating on an unlicensed basis under Part 15 also provide a means of access to the Internet. Metricom's Richochet service, for example, currently offers both fixed and mobile services at speeds of 128 kbps, with expectations of 256 kbps next year.[25/]

In short, it is apparent that the delivery of high-speed Internet and Internet access services is already a competitive business and will become even more so in the near term. The market is working. There is no cable "bottleneck" that enables cable operators to restrict output or raise prices for high-speed Internet access. The prospects for continuing growth of broadband competition are bright. The Commission must, however, be careful; investment and innovation in cable Internet services and in competing technologies and services would be diminished by the prospects of new regulatory impositions, including common carrier regulation.

III. THE TELECOMMUNICATIONS ACT DOES NOT PERMIT TITLE II REGULATION OF INFORMATION SERVICES, INCLUDING CABLE INTERNET SERVICES.

A. The Commission Has a Long History of Regulatory Restraint Regarding Enhanced or Information Services.

Although Title II of the Communications Act is the basis for long-standing regulation of communications common carriers, the Commission has established a highly ***de***regulatory approach to the computer-enhanced services that are provided by way of telecommunications. The Commission first contemplated how to regulate "enhanced services" -- now generally known as "information services" -- in the *Computer Inquiry* proceedings begun thirty years

[24/] Dotcast, Inc., *Network Services* (service description), http://www.dotcast.com/html_site/index.html (viewed Nov. 30, 2000).

[25/] *See Speed Kills the Competition*, ABCNews.com, http://www.abcnews.go.com/sections/tech/DailyNews/richochet001026.html (viewed Nov. 15, 2000).

ago.[26/] These proceedings developed the pro-competitive, nonregulatory approach that has been consistently followed for three decades. This approach, which Congress overwhelmingly endorsed in the 1996 Act, was and is a pivotal factor in the development of the Internet.[27/]

In its *Computer I* proceeding, the FCC considered for the first time "the appropriate regulatory treatment of telephone company participation in the newly emerging, competitive industry of delivering data processing services over telephone lines," and it established a taxonomy to differentiate services that should continue to be regulated from those which combine communications and computing power and should be competitive and unregulated.[28/] That taxonomy was adjusted in the *Computer II* decision to create the framework that (with modifications) still exists today.

In *Computer II*, the Commission classified all services offered over a common carrier communications network as either "basic" or "enhanced." "Basic" services were the pure transmission capabilities offered by traditional communications common carriers, while "enhanced" services were those that added computer processing capability to create "value-added" capabilities.[29/] In a conscious effort to avoid unnecessary regulation and to allow

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[26/] *See generally California v. FCC*, 905 F.2d 1217, 1223-30 (9th Cir. 1990) (discussing the history of the FCC's three *Computer Inquiries*).

[27/] *See In the Matter of Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11546 (1998) ("*Report to Congress*") ("[t]he Internet and other enhanced services have been able to grow rapidly in part because the Commission concluded that enhanced service providers were not common carriers within the meaning of the Act").

[28/] *See* 905 F.2d at 1224 n.6, *citing*, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, Tentative Decision of the Commission, 28 F.C.C. 2d 291 (1970); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities ("First Computer Inquiry")*, Final Decision and Order, 28 F.C.C. 2d 267 (1971), *aff'd in part and rev'd in part, GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973).

[29/] *Id.* at 420 ¶ 97. "Enhanced services" are defined as services "offered over common carrier transmission facilities used in interstate communications which employ computer processing applications that act on the format, content, protocol or similar aspects of the subscriber's transmitted information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

robust and uninhibited competition and innovation, the Commission determined that enhanced services were not subject to Title II regulation but merely subject to oversight under Title I.[30/]

In *Computer III*, the Commission reaffirmed its definition of enhanced services and maintained its approach of regulating only communications common carriage, not the enhanced services that by then were beginning to be provided by a variety of noncarriers.[31/]

Computer II and *Computer III* had other features, such as the creation of structural separation requirements for AT&T and the Bell companies, and subsequently the substitution of a scheme of nonstructural safeguards to promote competition in the enhanced service market.[32/] But the fundamental policy approach -- which never changed -- was one of fostering competition and innovation, and avoiding unnecessary regulation, in the information services market.

[30/] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, 428 (1980) ("*Computer II Final Order*"); *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom., Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) ("*CCIA*"), *cert. denied*, 461 U.S. 9389 (1983). *See CCIA*, 693 F.2d at 207, *citing*, *Computer II Final Order*, 77 FCC 2d at 432 (footnotes omitted)(determining that the Commission has ancillary jurisdiction over enhanced services under section 152 and 153 of the Act. Section 152 gives the Commission jurisdiction over "all interstate and foreign communication by wire or radio," and section 153 defines "communications by wire" as "the transmission of writing, signs, signals, pictures and sounds of all kinds ... incidental to such transmission"). The Commission has used its Title I authority only sparingly, especially in recent years.

[31/] *See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 F.C.C. 2d 958, 1013 (1986) ("*Computer III Phase I Order*"), *modified on recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989); *Phase II*, Report and Order, 2 FCC Rcd 3072 (1987)("*Computer III Phase II Order*"), *further recon.*, 4 FCC Rcd 5927 (1989), *rev'd in part sub nom., California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *on remand*, 6 FCC Rcd 7571 (1991), *vacated in part and remanded*, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994).

[32/] Notably, the Commission imposed "open network architecture" and "comparably efficient interconnection" requirements solely on the Bell operating companies, and subsequently GTE. *See Computer III Phase I Order*, 104 F.C.C. 2d at 1026-27 (subsequent history omitted); *Application of Open Network Architecture and Nondiscrimination Safeguard to GTE Corporation*, 9 FCC Rcd 4922 (1994). Initially, the Commission imposed similar requirements on AT&T, but later relieved AT&T of most of these obligations. *See Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5909-10 (1996); *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562, 4579-80 (1995).

B. The Changes Wrought by the Telecommunications Act of 1996 Were Intended To Preserve the Unregulated Status of Information Services, Including Those Provided by Cable Companies.

1. Congress codified a definition of information services, but it added nothing that could reasonably be construed as authority to subject them to Title II regulation.

Thus, the FCC has long distinguished between basic "communications" or "transmission" services, on the one hand, and "enhanced services" that are provided by means of telecommunications facilities, on the other hand. Congress approved this approach in the 1996 Act. The nomenclature changed slightly, with "telecommunications service" being used in lieu of "communications common carriage" and "information service" substituting for "enhanced service," but the fundamental dichotomy was preserved.

The Communications Act, as amended, now defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[33/] The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[34/] Significantly, although Congress made many changes to Title II to create new distinctions among telecommunications carriers, and to impose new regulatory responsibilities upon ILECs, nothing in the 1996 Act can reasonably be construed as subjecting "information services" to Title II regulation.

[33/] 47 U.S.C. § 153(43).

[34/] 47 U.S.C. § 153(20).

2. The FCC has read the 1996 Act to affirm the unregulated status of information services, specifically including Internet access services.

The Commission has properly ruled that the definitions adopted in the 1996 Act affirm the fundamental distinctions adopted in the *Computer Inquiries*.[35] It has determined that the services previously classified as "enhanced" are now encompassed within the statute's definition of "information services."[36] As explained in the Commission's 1998 *Report to Congress,* information services and telecommunications services are "mutually exclusive" categories.[37] The Commission found that, "when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not ***offer*** telecommunications. Rather, it offers an 'information service' even though it ***uses*** telecommunications to do so."[38]

In its Report to Congress, the Commission specifically found that "Internet access services are appropriately classified as information, rather than telecommunication, services."[39] To the extent that cable Internet services offer subscribers online content and access to the World Wide Web, they provide the same information access as other Internet access services and are therefore themselves "information services."[40]

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[35] The Commission has determined that "Congress intended the 1996 Act to maintain the *Computer II* framework," *not* to effect "a major change in the regulatory treatment of [information] services." *Report to Congress*, 13 FCC Rcd at 11524.

[36] *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955 (1996).

[37] *See Report to Congress,* 13 FCC Rcd at 11520.

[38] *Id.* (emphasis added). *See also Federal-State Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9179-9181 (1997) (subsequent history omitted) (rejecting the argument that information services are "inherently" telecommunications services for purposes of section 254 because information services are provided "via telecommunications").

[39] *Report to Congress*, 13 FCC Rcd at 11536.

[40] The Commission has labeled it "incorrect" to suggest that Internet access providers "offer subscribers separate services -- electronic mail, Web browsing, and others -- that should be deemed to have separate legal status . . . . The service that Internet access providers offer to members of the public is Internet access." *Report to Congress*, 13 FCC Rcd at 11539. The Commission was aware that Internet access "involves data transport elements" but found that Internet access providers "conjoin the data transport with data processing, information

3. In the 1996 Act, Congress expressly recognized the virtues of unregulated competition and an unregulated Internet.

The 1996 Act includes other expressions of Congress's intention that the Internet and related services should continue to develop on a competitive and unregulated basis. Section 230(a) of the Communications Act, as amended, expressly recognizes "[t]he rapidly growing array of Internet and other interactive computer services" and that "the Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[41/] Section 230(b) established a national policy of "promot[ing] the continued development of the Internet and other interactive computer services and other interactive media" and "preserv[ing] the vibrant and competitive free market that presently [sic] exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[42/] Moreover, the 1996 Act is premised on establishing "a pro-competitive, deregulatory national policy framework" and making "advanced telecommunications and information technologies and services" available to all Americans, "by opening all telecommunications markets to competition."[43/] These findings and statements of policy provide further support for maintaining the unregulated status of information services, including those that are cable services.

C. Congress Expanded the Definition of "Cable Service" To Encompass Internet Services.

Comcast has long maintained that cable Internet service is properly classified as a "cable service" under the expanded definition adopted in the 1996 Act. "Cable service" is now defined under the Communications Act to include not only "one-way transmission to

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provisions, and other computer-mediated offerings," which are characteristics of "enhanced" services. *Id.* at 11539, 11540.

41/ 47 U.S.C. § 230(a)(1)&(4).

42/ 47 U.S.C. § 230(b)(1)&(2).

43/ *See* S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("*Joint Explanatory Statement*").

subscribers of (i) video programming, or (ii) other programming service" but also "subscriber interaction, if any, which is required for the selection ***or use*** of such video programming or other programming service."[44/] Cable Internet service fits within "other programming service" which is defined broadly in the Act as "information that a cable operator makes available to all subscribers generally."[45/] Because Comcast's cable Internet service combines online content with a connection to the World Wide Web, subscribers use it to access "information," and this "information" is available to all subscribers generally.

The inclusion of cable Internet service within the array of cable services covered under 47 U.S.C. § 522(6) is consistent with the legislative history indicating Congress's intent that cable operators be able to offer information services as cable services.[46/] The legislative history establishes that the specific reference to subscriber interaction required for the "use" of programming was added expressly to "reflect the evolution of cable to include interactive services such as game channels and ***information services*** made available to subscribers by the cable operator, as well as ***enhanced services***."[47/] Cable operators offering information services, therefore, are simply offering Title VI cable services.[48/]

It bears emphasis that the redefinition of cable services took place within the context of other procompetitive and deregulatory amendments to the cable laws. Congress chose to

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[44/] 47 U.S.C. § 522(6) (emphasis added).

[45/] 47 U.S.C. § 522(14).

[46/] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Reply Comments of Comcast Corporation, at 18-19 (Oct. 8, 1998).

[47/] *Joint Explanatory Statement* at 169 (emphasis added).

[48/] Such an interpretation of cable services is consistent with past revisions of the Act. Even in 1984, when Congress expanded the definition of "cable services" to include "other programming services," it is significant that Congress intended to include as cable services "online services" which transmit generally available information to customers' personal computers and in which customers "select" the information that they view. H.R. Rep. No. 934, 98th Cong., 2d Sess. 41-44.

sunset all regulation of cable programming services, beginning April 1, 1999,[49] and to create a mechanism to deregulate even the basic service tier where the cable operator is subject to effective competition.[50] These developments manifest a clear desire to attenuate legacy regulation, not to perpetuate it and extend it to new (and competitive) services.

It is simply impossible to read the various amendments to the cable laws adopted in 1996 as intending increased regulatory burdens on cable. To the contrary, Congress hoped to create an environment that would foster investment and innovation by cable operators -- and competitors. This is precisely what has occurred.

D. Imposition of "Parity" Regulation Is Unfounded as a Matter of Law and of Policy.

In the Section 706 Inquiries and in briefs filed in connection with the *Henrico County* and *City of Portland* cases, forced access proponents have called for imposition of non-discriminatory access requirements on cable operators similar to those imposed on telecommunications carriers. ILECs argue that, under a concept of "parity," cable operators using their facilities to provide Internet access should be subject to the same regulatory requirements as telecommunications carriers that use their facilities to provide Internet access. This misapprehends the law.

The fact that subscribers can access the Internet both through the telephone company's common carrier services and through the information services, or cable services, provided by cable operators, does ***not*** signify that the Commission can or should impose the same regulations on both telephone companies and cable operators. It is Congress, not the

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[49] 47 U.S.C. § 543(c)(4).

[50] 47 U.S.C. § 543(d). Congress also made clear its intention that local franchising authorities refrain from regulating, in any way, the provision of telecommunications services by cable operators. *See* 47 U.S.C. § 541(b)(3).

Commission, that mandates the regulatory scheme applicable to particular service providers or service offerings.

1. Cable companies may not lawfully be regulated the same as ILECs.

It is important to understand just what it is that the ILECs are suggesting. While notions of "parity" obviously have some superficial appeal, only a modicum of analysis is needed to recognize that the ILECs are mounting a frontal assault on the regime carefully crafted by Congress. The plain truth is that there are only two ways in which cable companies could be treated the same as ILECs. One would be to subject cable companies to regulations that Congress created *only* for ILECs. The other would be to exempt ILECs from requirements from which Congress expressly instructed the Commission *not* to forbear. Neither approach is lawful.

Regulatory "parity," whether achieved by imposing ILEC common carrier regulation on cable operators or by lifting certain obligations imposed on ILECs, is not an option under the Communications Act. The 1996 Act was plainly not intended to subject new entrants' most innovative and competitive services to old-style regulation,[51/] and there is simply no way that the definition of "incumbent local exchange carrier" can be tortured to encompass cable companies such as Comcast.[52/] Conversely, although Congress provides a mechanism by which the Commission may forbear from imposing regulations on a telecommunications carrier, Congress prohibited the agency from exercising its forbearance authority with respect

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[51/] FCC Commissioner Michael Powell has criticized forced access requirements because he does not favor the application of common carrier "legacy regulation" to new technology. *See Powell Says Cable Open Access Arguments are Shallow*, COMMUNICATIONS DAILY, July 23, 1999; *see generally* Commissioner Michael K. Powell, *Remarks Before the Federal Communications Bar Association*, at 2 (June 15, 1999), http://www.fcc.gov.Speeches/Powell/spmkp902.html (viewed Nov. 27, 2000) ("*Powell Remarks to the FCBA*").

[52/] *See* 47 U.S.C. § 251(h). Indeed, Congress took pains to emphasize that a cable system "shall ***not*** be subject to regulation as a common carrier . . . by reason of providing any cable service." 47 U.S.C. § 541(c).

to certain obligations imposed on ILECs.[53/] Neither can the Commission use section 706(a) as an independent grant of forbearance authority with respect to telecommunications carriers.[54/]

2. The 1996 Act does not require "parity."

The 1996 Act does not represent a legislative determination favoring "parity" of statutory or regulatory responsibilities, regardless of differences in heritage, technologies used, market position, and so on. Quite the contrary.

Notably, Congress did not adopt the proposal advanced by the National Telecommunications and Information Administration ("NTIA") to create a unified regime for certain services expected to be offered by a variety of different industry sectors. NTIA expected that telecommunications, cable, and other industries would all ultimately compete in the provision of two-way, broadband, switched digital transmission services that enable users to originate and receive high-quality voice, data, graphics, and video. On that basis, NTIA advocated the adoption of new Title VII of the Communications Act, under which all of these offerings would have been subject to uniform treatment.[55/] Congress, however, did ***not*** adopt NTIA's proposed Title VII.[56/]

[53/] *See* 47 U.S.C. § 160(a) & (d).

[54/] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24044-48 (1998) (petitions for reconsideration pending).

[55/] *See, e.g., Testimony of Commerce Secretary Ronald H. Brown on S. 1822, the Communications Act of 1994, before the Senate Committee on Commerce, Science and Transportation* (Feb. 23, 1994), http://www.iitf.nist.gov/documents/speeches/brown_senate_test022394.html (viewed Nov. 27, 2000).

[56/] The Commission has inquired whether the notion of "advanced telecommunications capability" is of any utility in addressing issues of regulatory classification. *NOI* at 10. Comcast believes not. The notion of advanced telecommunications capability, as set forth in section 706 of the 1996 Act, was not codified in the Communications Act. It exists outside that statute, as a general instruction for what the FCC is to monitor, promote, and otherwise treat in conformity with its authority under the Communications Act. (Section 706 is really just the sole surviving vestige of NTIA's proposed Title VII, which would have created a unified regulatory regime. Congress chose not to do that but instead to leave different regulatory regimes for cable, broadcast, wireless, etc. The sole respect in which it "lumped them all together" was for purposes of the inquiry and general guidance given in Section 706.)

Indeed, far from establishing a "one-size-fits all" approach to regulation, Congress in the 1996 Act deliberately chose to create new distinctions among market participants and to vary their obligations on the basis of a variety of factors. Besides ***preserving*** the traditional distinctions among cable operators, broadcasters, common carriers, etc., Congress actually created ***new*** distinctions as well. Indeed, within a single section, it created certain obligations that apply to all telecommunications carriers,[57/] certain other obligations that apply only to local exchange carriers,[58/] and additional responsibilities that apply only to ILECs.[59/]

Thus, for example, Congress chose to require that ILECs -- exclusively -- provide requesting carriers with unbundled access to the piece-parts of the ILECs' networks.[60/] It required ILECs -- and no one else -- to offer their retail services to competitors on a wholesale, avoided-cost basis.[61/] It required ILECs -- alone -- to allow their competitors to collocate equipment needed for interconnection in ILEC central offices and other facilities.[62/] Congress did ***not*** extend unbundling, collocation, or other ILEC requirements to any other common carriers (including CLECs) or to cable operators, which are not telecommunications carriers at all. It did ***not*** require "parity." Instead, Congress drew careful distinctions, which the Commission should continue to respect.

57/ 47 U.S.C. § 251(a).

58/ 47 U.S.C. § 251(b).

59/ 47 U.S.C. § 251(c). Congress even subdivided its treatment of ILECs. Certain ILECs are not subject to Section 251(c) requirements except upon determination by a state commission; others may obtain exemption from a state commission upon a specified showing; and still others are fully subject to section 251(c) unless and until the Commission exercises its forbearance authority or the law is changed. *See* 47 U.S.C. § 251(f)(1)&(2). Additional distinctions were created by the special provisions of sections 271-275, which create particularized rules governing the participation by the Bell companies in certain markets in exchange for relieving them (elsewhere in the 1996 Act) from a judicial consent decree.

60/ *See* 47 U.S.C. § 251(c)(3).

61/ *See* 47 U.S.C. § 251(c)(4).

62/ *See* 47 U.S.C. § 251(c)(6).

3. Parity complaints are unfounded as a matter of policy.

The behavior of the ILECs completely betrays their complaints about the "burdens" of ILEC regulation. They have all foregone numerous opportunities to compete under different regulatory regimes and to invest in the building of non-ILEC facilities.

At the time that the Telecommunications Act was passed, the largest ILEC served only one-seventh, and the others served an even smaller fraction, of the country.[63/] As to the rest, each of the large ILECs had the opportunity to enter as a CLEC with none of the "burdens" associated with Section 251(c). Despite their claims that the FCC has unfairly advantaged CLECs over ILECs, it speaks volumes that the ILECs have *not* pursued the opportunity to function as CLECs but have instead concentrated on their in-region markets. Equally revealing are their decisions to consolidate into ever-larger companies, thereby bringing vast areas of the country within their "in-region" areas. Similarly, for all their complaints about preferential treatment of cable vis-à-vis ILEC operations, and their freedom to operate under the cable regulatory model, they have forgone the opportunity to provide cable services.[64/] It appears, then, that life as an ILEC is not "unfair" after all.

Moreover, the Commission has demonstrated its willingness to do what it can to reduce the "burdens" -- including statutory burdens -- of which the ILECs so constantly complain. For example, in some markets the unbundling requirement for local circuit switching has been eased.[65/] In addition, certain network elements used to provide advanced services are not

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[63/] In 1996, BellSouth was by far the largest ILEC, with 21.7 million switched access lines -- compared to the national total of 155.2 million switched access lines. FCC STATISTICS OF COMMUNICATIONS COMMON CARRIERS, 1996/1997 ed., at 137, 140 (Table 2.10).

[64/] *See, e.g.*, "*Verizon Looks to Sell GTE Cable Business*," Reuters (July 28, 2000), http://dailynews.yahoo.com/h/nm/20000728/tc/telecoms_verizon_dc_1.html (viewed July 31, 2000); Andrew Backover, *BellSouth may join rivals in dumping TV*, USA TODAY, November 20, 2000, at 1B (citing pullbacks by BellSouth, Qwest, SBC, and Verizon); Phil Porter, *Ameritech to Shop Cable Division*, THE COLUMBUS DISPATCH, March 29, 2000, at 2000 WL 15475430.

[65/] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3822-3831 (1999).

subject to unbundling.[66] Also, for the two largest ILECs, which together have more than two-thirds of all access lines in the country, the Commission has agreed that "advanced services affiliate[s]" that operate in accordance with certain structural and behavioral conditions will be regarded as CLECs, not ILECs, and therefore exempt from the requirements of Section 251(c).[67]

The Commission has taken and is considering additional regulatory relief efforts on behalf of ILECs. Advanced services sold in bulk to Internet Service Providers for inclusion in their high-speed Internet service offerings have been ruled not to be subject to the section 251(c)(4) obligation to offer services available for resale on an avoided cost basis.[68] Furthermore, the FCC has proposed to allow nondominant carriers, and has at least expressed a willingness to consider allowing ILECs, to bundle CPE and enhanced services with basic services.[69]

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[66] *Id.* at 3835 (declining to unbundle packet switching and DSLAM functionality, except in limited circumstances).

[67] *See Application of Ameritech Corporations and SBC Communications Inc. for Transfer of Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14893-14909 (1999) (analysis concluding that the SBC/Ameritech advanced service affiliate would not be a "successor or assign" of the ILEC and thus is not subject to the 251(c) obligations imposed on the ILEC); *Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, ¶ 272 (rel. June 16, 2000)("just as a BOC affiliate under section 272 would offer long-distance services (as a non-incumbent) free of the obligations of sections 251(c)(4), the advanced services affiliate should be allowed to offer advanced services free of such obligations").

[68] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, ¶ 3 (rel. November 9, 1999). The Commission's intent in the case of bulk DSL service pricing was to encourage incumbents to offer advanced services to ISPs at the lowest possible price which would in turn enable ISPs, "as unregulated information service providers, to package the DSL service with their Internet service" and offer affordable, high-speed access to the Internet to residential and business customers.

[69] *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21531, 21545 (1998).

Far from requiring parity, the Communications Act (both before and after the 1996 Act) contains many provisions that apply uniquely to one class of market participant or another. Cable companies, for example, are ***uniquely*** subject to local franchising requirements and local franchising fees,[70/] and are ***uniquely*** required, upon request by local television broadcasters, to carry their signals without compensation.[71/] Television broadcasters have a ***unique*** obligation to remit a portion of any revenues delivered from "ancillary and supplemental services" delivered as part of their digital bitstreams to the U.S. Treasury,[72/] but are ***uniquely*** exempt from other spectrum usage fees. DBS providers have a ***unique*** obligation to reserve between four and seven percent of their transponder capacity (currently 4 percent, under FCC rules) for "noncommercial, educational programming."[73/] In these and many other ways, the law imposes different responsibilities on different kinds of companies, even though they provide similar or even identical services to consumers.

Congress established these and many other distinctions in its wisdom, taking account of history, heritage, market power, expectation interests, and other factors. "Parity" simply was not a decisive consideration.

E. Congress Did Not Alter the Long-Standing Differentiation Between Common Carriage and Private Carriage.

As explained above, Comcast believes that cable Internet service is properly regarded as a cable service and is in all events an information service that is exempt from any common carrier regulation. But even if the Commission were to conclude that Comcast provides some form of "telecommunications" to @Home, or vice versa, this still would not permit the

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[70/] 47 U.S.C. §§ 541, 542.

[71/] 47 U.S.C. § 534(b)(10).

[72/] 47 U.S.C. § 336(e)

[73/] 47 U.S.C. § 335(b)(1).

imposition of ILEC unbundling obligations, *Computer II* unbundling requirements, or other regulatory conditions applicable to ILECs.

Even if there were any "telecommunications" provided in the course of the Comcast-@Home relationship (or in relationships that may be developed with other ISPs), they constitute, at most, private carriage. Private carriage is not common carriage.

The Commission has long recognized a distinction between common carriage and private carriage. Private carriers provide telecommunications facilities to third parties under individually negotiated rates, terms and conditions.[74/] On the other hand, "common carriers" offer their facilities indiscriminately to the public at large (or some subset of the public). Comcast's relationship with @Home is the product of sophisticated and complex negotiations, and the terms of the relationship have been amended in light of the parties' evolving experience with the changing technologies and consumer desires. (The same will be true of any other relationships that Comcast establishes with other ISPs.) Under these circumstances, even were the Commission to ignore the many aspects of the transactions between Comcast and @Home that extend beyond the mere provision of pure transmission services,[75/] any regulation under Title II would necessarily be limited to that appropriate to private carriage arrangements, not common carriage.[76/]

[74/] *NARUC v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976).

[75/] The relationship between Comcast and @Home is far more complex and interdependent than the relationship between a communications common carrier and its customer. For example, Comcast adds content to the @Home offering, and @Home controls and manages devices (such as the cable modem termination systems) that are owned by Comcast. Responsibility for Internet traffic management on Comcast's cable facilities has resided with @Home but is being taken over by Comcast.

[76/] Comcast perceives no sustainable rationale by which cable Internet services could be subjected to common carriage obligations. If, however, the Commission were to conclude otherwise, it would be imperative for the Commission simultaneously to use its forbearance authority to eliminate any Title II obligations. *See* 47 U.S.C. § 160.

F. Title II Regulation of Cable Internet Service Would Also Violate the First Amendment.

Yet another reason not to subject cable Internet services to Title II regulation is the First Amendment. In contrast to common carriers, who hold themselves out to carry the speech of third parties on a nondiscriminatory basis, cable operators are First Amendment speakers and "are entitled to the protection of the speech and press provisions of the First Amendment."[77] In *Turner I*, the Supreme Court found that the First Amendment protects the interests of cable operators to exercise "editorial discretion over which stations or programs to include in [their] repertoire" and to determine how the channels and the capacity of the system will be used to serve consumers.[78]

Imposing a requirement that cable operators provide non-discriminatory access to their cable Internet platform would limit a cable operator's First Amendment editorial discretion. The U.S. District Court for the Southern District of Florida -- in a case involving Comcast's Broward County cable system -- recently ruled that forced access requirements imposed on cable operators by Broward County violated the cable operators' First Amendment editorial discretion.[79]

Specifically, the district court found that the forced access requirement established by the County "singles out cable operators from all other speakers and discriminates further against those cable operators who choose to provide Internet content."[80] The court also determined that the ordinance "both deprives the cable operator of editorial discretion over its programming and harms its ability to market and finance its service, thereby curtailing the

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[77] *Turner Broadcasting System v. FCC*, 512 U.S. 622, 636 (1994) (*Turner I*), *citing*, *Leather v. Medlock*, 499 U.S. 439, 444 (1991).

[78] *Turner I* at 636 (citations omitted).

[79] *See Comcast Cablevision of Broward County v. Broward County*, Case No. 99-6934-CIV, slip op. at 22-24 (S.D. Fla.) (Nov. 9, 2000).

[80] *Id.* at 15 (specifically noting that wireless, satellite, and telephone transmission, as well as other providers of Internet service, were not subject to the same requirement as cable).

flow of information to the public."[81] Further, the court found that the ordinance "distorts and disrupts the integrity of the information market by interfering with the ability of the market participants to use different cost structures and economic approaches based upon the inherent advantages and disadvantages of their respective technolog[ies]."[82] The court found that this requirement could not survive review under either a "strict scrutiny" or "intermediate scrutiny" standard of review.[83] Finally, the court found "the harm the ordinance is purported to address appears to be non-existent," because "[c]able possesses no monopoly power with respect to Internet access."[84]

All of these First Amendment issues would arise under any forced access regime imposed by the Commission.

IV. ATTEMPTS TO REGULATE UNBUNDLING OF CABLE INTERNET WOULD ENMESH THE COMMISSION IN A LEGAL AND LOGISTICAL QUAGMIRE.

No coherent theory justifies applying unbundling requirements to cable. Forced access proponents tend to rely more on emotion than on legal analysis, but, when their arguments are parsed, it becomes apparent that they employ two different -- and quite distinct -- legal theories. Some seek to apply the unbundling requirements of 251(c), and some seek to force unbundling of "basic" from "enhanced" service, as purportedly required by *Computer II*. Neither approach works legally or practically.

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[81] *Id.* at 16.

[82] *Id.* at 16-17.

[83] *Id.* at 24, 26. The court emphasized differences between the forced access requirement here and the must-carry provisions upheld (by the narrowest of majorities) in *Turner I*: cable operators "control no bottleneck monopoly over access to the Internet; no history exists of cable operators serving as a conduit for Internet service providers but cable operators do have a long history of serving as a conduit for broadcast signals; and there would be no limit on the number of ISPs that might demand access to a cable system while there is a finite identifiable number of broadcasters in a community that may seek carriage on a cable system through the must-carry provisions; and some information services that the ordinance would permit to access the cable platform could be offensive to cable operators and their subscribers. *Id.* at 22-24.

[84] *Id.* at 25.